Provisional

For participants only

25 August 2017

Original: English

International Law Commission
Sixty-ninth session (second part)

Provisional summary record of the 3383rd meeting
Held at the Palais des Nations, Geneva, on Monday, 31 July 2017, at 10 a.m.

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Present:

Chairman:	Mr. Nolte
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Hadi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Succession of States in respect of State responsibility (agenda item 7 *bis*) (*continued*) (A/CN.4/708)

Report of the Drafting Committee

Mr. Rajput (Chairman of the Drafting Committee), presenting the seventh and last report of the Drafting Committee for the sixty-ninth session of the Commission, on the topic "Succession of States in respect of State responsibility", said that the Committee had met on 25 July 2017 to consider the four draft articles proposed in the first report of the Special Rapporteur on the topic (A/CN.4/708), which the Commission had decided to refer to the Committee. He recalled that the Special Rapporteur, in summing up the plenary debate on the topic, had recommended that draft articles 3 and 4 should remain under the Committee's consideration until the Commission's next session, when Commission members would have a clearer picture of the residual rules on non-succession and succession to be proposed in the Special Rapporteur's second report. Accordingly, his statement constituted an interim report on the progress made thus far by the Drafting Committee.

In line with the Special Rapporteur's recommendation, the Committee had considered only draft articles 1 and 2 as proposed in the Special Rapporteur's first report, together with a number of reformulations suggested by the Special Rapporteur in response to suggestions made and concerns raised during the plenary debate. The Special Rapporteur's mastery of the subject, guidance and cooperation had greatly facilitated the Committee's work.

The Committee had retained the English text of draft article 1, entitled "Scope", as originally proposed by the Special Rapporteur, with only one amendment: the word "effect" had been changed to "effects", to align the text with that of the corresponding articles of the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. In the French version of the draft article, the title had been changed from "*Portée*" to "*Champ d'application*" for the sake of consistency with the Commission's past practice.

The Committee had discussed whether it might be appropriate to refer, in draft article 1, to rights and obligations rather than to the responsibility of States for internationally wrongful acts. The Committee had decided to retain the latter wording, as proposed in the Special Rapporteur's report, because it reflected the title of the topic and was consistent with the 1978 and 1983 Vienna Conventions. Furthermore, as was clarified in the Special Rapporteur's report, the notion of rights and obligations was implicit and did not need to be mentioned separately. The term "responsibility of States" was understood as not suggesting that the successor State was necessarily responsible for an internationally wrongful act. The commentary would clarify that understanding and would stress the importance of the concept of rights and obligations in the context of the topic.

The English version of the title of draft article 2, "Use of terms", had been retained as originally proposed by the Special Rapporteur, but the French version had been changed from "*Définitions*" to "*Expressions employées*" for the sake of consistency with the Commission's past practice. Subparagraphs (a), (b), (c) and (d) of that draft article, defining the terms "succession of States", "predecessor State", "successor State" and "date of the succession of States", respectively, had been adopted by the Committee as proposed in the Special Rapporteur's report. Those definitions were consistent with the ones set forth in the 1978 and 1983 Vienna Conventions and in the articles on nationality of natural persons in relation to the succession of States.

The text proposed in the Special Rapporteur's report also included a subparagraph (e) defining the term "international responsibility". However, as the Special Rapporteur had noted at the conclusion of the plenary debate, it appeared that that definition was unnecessary and that the Commission should retain only the uncontroversial definitions taken from the 1978 and 1983 Vienna Conventions. In line with that suggestion, the Committee had deleted subparagraph (e), considering that the concepts of "State responsibility" and "internationally wrongful acts" could be explained in the commentary.

Moreover, the Commission could decide to define additional terms in draft article 2 as its work on the topic progressed. Lastly, he reiterated that he had presented his report for information purposes only, as the Commission was not being requested to take action on the draft articles at the current stage.

The Chairman said he took it that the Commission wished to take note of the interim report presented by the Chairman of the Drafting Committee.

It was so decided.

Draft report of the Commission on the work of its sixty-ninth session

The Chairman said that, in line with its past practice, the Commission would adopt its report paragraph by paragraph. The members would need to focus on substantive issues and to show self-discipline in order to achieve the consensus on which the Commission's authority depended. They should also bear in mind the Commission's practice of not reopening a discussion on draft texts that had previously been adopted on a provisional basis.

Chapter IV. Crimes against humanity (A/CN.4/L.900 and Add.1/Rev.1, Add.2 and Add.3)

The Chairman said that, at its sixty-seventh and sixty-eighth sessions, the Commission had already provisionally adopted the bulk of the draft articles and commentaries thereto on the topic of crimes against humanity. He invited the Commission to consider chapter IV of the draft report, beginning with the portion of the chapter contained in document A/CN.4/L.900.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 6

Paragraphs 4 to 6 were adopted.

Paragraph 7

Mr. Murphy (Special Rapporteur) said that he would like the report to reflect, either in paragraph 7 or elsewhere, the fact that the Drafting Committee had discussed the draft texts at its meeting of 6 July 2017, the outcome of which had been reported to the Commission by the Chairman of the Drafting Committee on 19 July 2017.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 10

The Chairman said that paragraphs 8 to 10 would be revisited once the Commission had adopted the entire chapter of the report.

C. Text of the draft articles on crimes against humanity adopted by the Commission on first reading

1. Text of the draft articles

Paragraph 11

Mr. Murphy (Special Rapporteur) recalled that paragraph 4 *bis* had been added to draft article 6 during the course of the current session; the Secretariat, therefore, would insert it as a new paragraph 5 in draft article 6, and would renumber the subsequent paragraphs accordingly.

Paragraph 11 was adopted.

The Chairman invited the Commission to consider the portion of chapter IV contained in document A/CN.4/L.900/Add.1/Rev.1.

Mr. Murphy (Special Rapporteur) said that document A/CN.4/L.900/Add.1/Rev.1 reflected minor changes to the provisionally adopted commentaries that had previously been issued in document A/CN.4/L.900/Add.1. The changes mostly concerned citations and stylistic adjustments to keep the commentaries consistent. In response to a concern that had been raised by one of the newly elected Commission members, he said that the commentaries were being adopted on first reading and that further changes could be introduced on second reading.

Mr. Jalloh said that he had raised the issue and that he did not object to proceeding, on the understanding that concerns about incomplete citations and other more substantive aspects on how to strengthen the commentaries would be addressed on second reading. That seemed to be a sensible way to proceed, in view of the lack of time to adopt the entire annual report and to propose substantial changes to the commentary from the plenary floor. It was based on that understanding that he had not submitted detailed line-by-line proposals, but expected that that could be done during the second reading.

C *Text of the draft articles on crimes against humanity adopted by the Commission on first reading*

2 *Text of the draft articles and commentaries thereto*

Commentary to draft article 1 (Scope)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Murphy (Special Rapporteur) said that paragraph (3) referred to the avoidance of any conflicts with the obligations of States in respect of international criminal tribunals. While that paragraph was useful, it was in the wrong place, as there was now a general commentary to the draft articles as a whole, contained in document A/CN.4/L.900/Add.2. He proposed that paragraph (3) should be moved to the end of that general commentary, where it would become paragraph (4).

It was so decided.

The commentary to draft article 1 as a whole, as amended, was adopted.

Commentary to draft article 2 (General obligation)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

Mr. Murphy (Special Rapporteur) said that, in the first sentence of paragraph (6), the word "however" should be replaced with "also" and the commas around it should be deleted. Further on in that same sentence, the phrase "no connection" should read "a connection".

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraph (9)

Mr. Murphy (Special Rapporteur) said that the second sentence of paragraph (9), which referred to the "chapeau" requirements set out in paragraph 1 of draft article 3, should closely track the wording of those requirements in that draft article. He thus proposed that the end of the sentence should be amended to read "directed against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such attack".

Sir Michael Wood said that he agreed with the proposed drafting changes. Moreover, he proposed that the phrase "committed within the context of" in that same sentence should be amended to read "committed as part of".

Paragraph (9), as amended, was adopted.

The commentary to draft article 2 as a whole, as amended, was adopted.

Commentary to draft article 3 (Definition of crimes against humanity)

Paragraphs (1) to (41)

Paragraphs (1) to (41) were adopted.

The commentary to draft article 3 as a whole was adopted.

Commentary to draft article 4 (Obligation of prevention)

Paragraphs (1) to (11)

Paragraphs (1) to (11) were adopted.

Paragraph (12)

Mr. Murphy (Special Rapporteur) said that, at the beginning of the second sentence of paragraph (12), the words "For the latter" should be replaced with "In this instance".

Paragraph (12), as amended, was adopted.

Paragraphs (13) to (23)

Paragraphs (13) to (23) were adopted.

The commentary to draft article 4 as a whole, as amended, was adopted.

Commentary to draft article 6 (Criminalization under national law)

Paragraph (1)

Mr. Murphy (Special Rapporteur) recalled that some of the paragraphs in draft article 6 would be renumbered to accommodate the insertion of paragraph 4 *bis* as the new paragraph 5. In the first sentence of paragraph (1) of the commentary, the words "to preclude any superior orders defence" should be replaced with "to preclude certain defences", since that wording encompassed both the superior orders defence — addressed in paragraph 4 — and the official position defence — addressed in what would now be paragraph 5.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (23)

Paragraphs (2) to (23) were adopted.

Paragraph (24)

Mr. Murphy (Special Rapporteur) said that, in the first sentence, the phrase "excluding criminal responsibility" should be changed to "excluding substantive criminal

responsibility", since that wording would be consistent with that of the commentary to be adopted for the new paragraph 5 on the official position defence.

Paragraph (24), as amended, was adopted.

Paragraphs (25) to (46)

Paragraphs (25) to (46) were adopted.

The commentary to draft article 6 as a whole, as amended, was adopted.

Commentary to draft article 7 (Establishment of national jurisdiction)

Paragraph (1)

Mr. Murphy (Special Rapporteur) said that the words "referred to in draft article 6" should be replaced with "covered by the present draft articles", in keeping with the approach taken in the other draft articles.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (11)

Paragraphs (2) to (11) were adopted.

The commentary to draft article 7 as a whole, as amended, was adopted.

Commentary to draft article 8 (Investigation)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft article 8 as a whole was adopted.

Commentary to draft article 9 (Preliminary measures when an alleged offender is present)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft article 9 as a whole was adopted.

Commentary to draft article 10 (Aut dedere aut judicare)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

Mr. Murphy (Special Rapporteur), supported by **Sir Michael Wood**, said that, in the first sentence, the words "or extradites or surrenders the person" should be deleted, since the focus of the second sentence of draft article 10 was on the submission of a matter to prosecution by a State.

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

Paragraph (10)

Mr. Murphy (Special Rapporteur) said that Mr. Grossman Guiloff had proposed two amendments to paragraph (10): the addition of a sentence at the end of the paragraph that would read "Since the entry into force of the 1998 Rome Statute, several States have

adopted national laws that ban amnesties and similar measures with respect to crimes against humanity", and the insertion of a footnote citing relevant national laws in nine countries, namely Argentina, Burkina Faso, Burundi, the Central African Republic, Colombia, the Comoros, the Democratic Republic of the Congo, Panama and Uruguay. He personally agreed with the proposals.

Mr. Tladi said that he did not object to the proposals, provided that the Special Rapporteur had checked the content of the national laws in question. He would, however, prefer to replace the word "ban" with a more formal term.

Mr. Murphy (Special Rapporteur) said that he had checked the content of the national laws. The word "prohibit" could be used instead of "ban".

Paragraph (10), as amended, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

The commentary to draft article 10 as a whole, as amended, was adopted.

Commentary to draft article 11 (Fair treatment of the alleged offender)

Paragraphs (1) to (10)

Paragraphs (1) to (10) were adopted.

The commentary to draft article 11 as a whole was adopted.

The Chairman invited the Commission to consider the portion of chapter IV contained in document A/CN.4/L.900/Add.2.

C. *Text of the draft articles on crimes against humanity adopted by the Commission on first reading*

2. *Text of the draft articles and commentaries thereto*

Paragraph 1

Paragraph 1 was adopted.

Crimes against humanity

General commentary

Paragraph (1)

Mr. Tladi proposed the addition of two sentences at the end of the paragraph, which should read: "On the other hand, the view was expressed that neither the Genocide Convention nor the Geneva Conventions and related Protocols established elaborate inter-State cooperation mechanisms as provided for in the present draft articles. For that reason, it was considered that other core crimes could also have been addressed in the present draft articles."

Sir Michael Wood said that the word "elaborate" in Mr. Tladi's proposal should be replaced with "detailed" or a similar term.

The Chairman said that it would be left to Mr. Tladi and the Secretariat to finalize the wording of the proposed text to be inserted at the end of the paragraph.

Paragraph (1) was adopted on that understanding.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

New paragraph (4)

The Chairman recalled that the Commission had agreed to the Special Rapporteur's proposal to move paragraph (3) of the commentary to draft article 1 (Scope) to the end of the general commentary, where it had become paragraph (4).

New paragraph (4) was adopted.

The general commentary as a whole, as amended, was adopted.

Commentary to the preamble

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murphy (Special Rapporteur) said that, in the second sentence, the words "and magnitude" should be deleted.

Mr. Jalloh proposed that, in the same sentence, the word "gravity" should be used in place of "heinousness".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Park said that, in footnote 9, the words "will be" should be replaced with "was".

It was so decided.

Mr. Park, noting that, in footnote 10, the Special Rapporteur introduced the short form of the name of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment but that, in subsequent paragraphs of the text of the commentaries, he reverted to the full name, asked what approach had been taken with regard to the style of the document.

Mr. Murphy (Special Rapporteur) said that, as he understood it, the Convention should be cited in full throughout the text of the commentaries. In the footnotes, the name should be given in full on first reference, with the short form used thereafter. He would liaise with the Secretariat to ensure consistency in the style of the document.

Paragraph (4), as amended, was adopted on that understanding.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were adopted.

Paragraph (9)

Mr. Park said that the second subparagraph, beginning with the words "The ninth preambular paragraph", should form a new paragraph (10).

Paragraph (9), as amended, was adopted.

New paragraph (10)

New paragraph (10) was adopted.

The commentary to the preamble as a whole, as amended, was adopted.

Commentary to draft article 5 (Non-refoulement)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

Mr. Park proposed that it should be specified, in the second sentence, that a State's "other obligations of *non-refoulement*" concerned refugees, among others.

Mr. Murphy (Special Rapporteur) said that, in paragraph (2), it was said that the principle of *non-refoulement* was commonly associated with refugees. Then, in paragraph (3), it was mentioned that the principle of *non-refoulement* had been applied to persons other than refugees in a wide range of instruments, with particular attention to the situation of torture and enforced disappearance noted in paragraphs (4) and (5). Bearing in mind the content of paragraphs (2) to (5), the meaning of the "without prejudice" clause discussed in paragraph (6) was clear. He was therefore of the opinion that no changes were necessary.

Mr. Saboia said that the paragraph was drafted correctly and should be adopted as it stood.

Paragraph (6) was adopted.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

Mr. Grossman Guiloff said that, in the last sentence, it should be made clear that the seven elements on the non-exhaustive list drawn up by the Committee against Torture were not, in themselves, sufficient to determine whether a person's return was permissible. Those and other elements had to be assessed in relation to the specific circumstances of each case.

The Chairman said that, to address that concern, the words "to be considered" could be replaced with "that need to be assessed in each individual case".

Paragraph (10), as amended, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

The commentary to draft article 5 as a whole, as amended, was adopted.

Commentary to draft article 12 (Victims, witnesses and others)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Grossman Guiloff said that the wording of the first sentence created some confusion as to whether the "term" it referred to was "rights of victims" or "victims". Under customary international law, a victim was a person who had suffered harm, and most treaties operated on the basis of that definition without expanding upon it. As currently worded, the paragraph left the definition of "victim" to the discretion of national legal systems, which was not the Commission's intention.

Mr. Murphy (Special Rapporteur) said that the point of the first sentence was that most treaties did not define the term "victim", although some exceptions and the corresponding definitions contained in those treaties were listed in footnote 45. In order to address the concern raised by Mr. Grossman Guiloff, he suggested that, in the second

sentence, the phrase "and under customary international law" should be inserted after the word "treaties". That would convey the idea that there was a backdrop of customary international law that informed the Commission's understanding in that area.

Sir Michael Wood said that he supported the Special Rapporteur's suggestion. In addition, he proposed, in the first sentence, the removal of the quotation marks from the word "victims" and the replacement of the words "that term" with the words "the term 'victim'".

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

Paragraph (8)

Mr. Murphy (Special Rapporteur) suggested that, at the beginning of the second sentence, the word "Later" should be replaced with the word "Recent".

Paragraph (8), as amended, was adopted.

Paragraphs (9) to (11)

Paragraphs (9) to (11) were adopted.

Paragraph (12)

Mr. Grossman Guiloff proposed the addition, to the end of the paragraph, of a "without prejudice" clause indicating that the article did not exclude the obligations acquired by States under international law. Such a clause was necessary because some treaties set forth obligations that did not provide the sort of flexibility referred to in paragraph (12).

The Chairman asked whether the "without prejudice" clause should read: "Draft article 12, paragraph 2, is without prejudice to the other obligations acquired by States under international law."

Mr. Murphy (Special Rapporteur) said that he had some reservations about the words "acquired by States" and suggested that the clause should be reformulated to read: "Paragraph 2 is without prejudice to other obligations of States that exist under conventional or customary international law."

Mr. Grossman Guiloff said that he objected to the inclusion of the word "other".

Mr. Murphy (Special Rapporteur) said that the word "other" referred to the fact that paragraph 2 was setting forth an obligation, and that that obligation was without prejudice to "other" obligations of States that might be comparatively stronger.

Mr. Vázquez-Bermúdez said that the sentence should refer only to "international law", which encompassed both conventional and customary international law.

Paragraph (12), as amended by the Special Rapporteur and Mr. Vázquez-Bermúdez, was adopted.

Paragraph (13)

Paragraph (13) was adopted.

Paragraph (14)

The Chairman suggested that, in the second sentence, the words "or enact" should be inserted after the words "obliges States to have", since, in the case of a civil war or other conflict, it often happened that a State did not have or could not envisage ahead of time the kind of legislation it needed in order to provide redress for victims. That point was also made in paragraphs (16) and (19) of the commentary to draft article 12.

Paragraph (14), as amended, was adopted.

Paragraphs (15) to (18)

Paragraphs (15) to (18) were adopted.

Paragraph (19)

Mr. Jalloh said that he had a concern about paragraph (14) that was related to paragraph (19). He was not sure that paragraph (14) reflected the flexibility to determine the appropriate form of reparation that Commission members in the Drafting Committee had wished to give States in recognition of the different circumstances in which crimes against humanity occurred. It might, in fact, be read as requiring States to do more than they were capable of doing. For that reason, he proposed that, in the penultimate sentence of paragraph (19), the word "any" should be inserted before the word "capacity" and a sentence should be inserted before the final sentence that would read: "The formulation of 'as appropriate' is thus intended to recognize that there is a margin of appreciation for States."

Mr. Grossman Guiloff said that he objected to the proposed inclusion of the word "any" before the phrase "capacity to provide substantive redress" and wondered whether the intended reference was to compensation, which was an element of redress. He proposed that the same "without prejudice" clause that had just been adopted for inclusion at the end of paragraph (12) should also be added to the end of paragraph (19).

The Chairman suggested, in the penultimate sentence, replacing the word "substantive" with the word "material", in keeping with the wording used in paragraph (18) of the commentary, which referred to "material and moral damages".

It was so decided.

Mr. Park said that a number of members had referred to the concept of transitional justice during the plenary debate on the topic. He therefore proposed the addition of a sentence at the end of the paragraph that would read: "In the past, the so-called 'transitional justice' has also tailored the form and amount of reparation."

Mr. Grossman Guiloff said that he did not like the expression "so-called" because it could be interpreted as pejorative. He proposed replacing that wording with a formulation such as "the transitional justice requirements that took the form of reparative justice".

The Chairman, in an attempt to reconcile the two proposals just made, suggested the wording "In the past, transitional justice arrangements have also tailored the form and amount of reparation".

Mr. Murphy (Special Rapporteur), supported by **Sir Michael Wood**, suggested that the second sentence might read better if the word "tailored" was replaced with the word "addressed".

Mr. Grossman Guiloff, referring to Mr. Jalloh's proposal, said that the term "margin of appreciation" had a specific technical meaning in the context of the European Union and had elicited strong doctrinal objection in the Western hemisphere. If the Commission used that term, it would have to define it. Perhaps the phrase "measure of discretion" could be used instead.

The Chairman suggested using the expression "margin of discretion".

Sir Michael Wood said that the additional sentence proposed by Mr. Jalloh seemed redundant in light of the second sentence of the paragraph. He doubted whether it was necessary to include the word "any".

Ms. Lehto said that she had a concern regarding the wording of Mr. Park's proposal.

Mr. Jalloh said that he endorsed the Chairman's suggestion that the phrase "margin of discretion" should be used, but he disagreed with Sir Michael Wood that the sentence he had proposed was an unnecessary repetition. Rather, his own view was that it would serve to emphasize the point that States were to be accorded flexibility.

The meeting was suspended at noon and resumed at 12.20 p.m.

Mr. Murphy (Special Rapporteur) suggested, following consultations with Mr. Grossman Guiloff, Mr. Jalloh, Mr. Park and Sir Michael Wood, that several changes should be made to the second sentence: the phrase "must have flexibility to determine" should be amended to read "must have some flexibility and discretion to determine", and the phrase ", including those of transitional justice," should be inserted after the word "arise". In the penultimate sentence, the word "any" should be inserted before the word "capacity" and the word "substantive" should be replaced with the word "material". Lastly, he suggested the addition of a final sentence that would read: "Paragraph 3 is without prejudice to other obligations of States that exist under international law."

Paragraph (19), as amended, was adopted.

Paragraph (20)

Paragraph (20) was adopted.

Paragraph (21)

Mr. Grossman Guiloff, referring to the final sentence of the paragraph, said that as the Extraordinary Chambers in the Courts of Cambodia had experienced a variety of problems, including the resignation of judges, it was not a good example to which reference should be made. He therefore proposed the deletion of the final sentence.

Mr. Murphy (Special Rapporteur) said that, while he acknowledged that there were some concerns about the operation of the Extraordinary Chambers in the Courts of Cambodia, throughout the Commission's work on the draft articles it had referred to the structural elements of the Extraordinary Chambers, in particular the agreement between the United Nations and Cambodia regarding the Extraordinary Chambers. For that reason, it would be appropriate to mention that tribunal along with other "hybrid" tribunals, such as the Special Tribunal for Lebanon and the Special Court for Sierra Leone. However, the Commission should certainly be vigilant and not draw on any decisions of the Extraordinary Chambers about which it had any qualms.

Mr. Grossman Guiloff said that the Extraordinary Chambers were being mentioned as proof of a trend, whereas they had in fact been a failure and had been widely criticized. It would therefore be better if any reference to them was put in a footnote.

The Chairman, speaking as a member of the Commission, said that his understanding was that different examples would be cited to illustrate different approaches to reparations.

Mr. Jalloh said that he endorsed Mr. Murphy's position, especially as was not only the *ad hoc* criminal tribunals, such as the Extraordinary Chambers in the Courts of Cambodia, which had been criticized. Many of the other tribunals had also been criticized, for various reasons, including the United Nations ad hoc tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone and even the permanent International Criminal Court. If all such criticisms were taken into account in determining the rulings of international tribunals to cite in the commentary as explanations of the legal principles contained in the commentary, the Commission would be bereft of any judicial practice to cite.

Paragraph (21) was adopted.

The commentary to draft article 12 as a whole, as amended, was adopted.

Commentary to draft article 13 (Extradition)

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

Paragraph (9)

Mr. Park asked whether the International Convention against the Taking of Hostages and the Convention against Torture could really be described as "older treaties".

Mr. Murphy (Special Rapporteur) said he conceded that age might be in the eye of the beholder. He could agree to the deletion of the phrase "of the older".

The Chairman, speaking as a member of the Commission, said that relative age might sometimes be important to the argument. The text seemed to argue that more recent treaties addressed the issue in a more differentiated manner than earlier treaties. While the word "older" might indeed be rather harsh, the word "earlier" would preserve the line of reasoning and still meet Mr. Park's concern.

Mr. Murphy (Special Rapporteur) said that he would be prepared to amend the text to refer to "earlier treaties".

Mr. Park, supported by **Mr. Ouazzani Chahdi**, said that he preferred the Special Rapporteur's first proposal, whereby the phrase "of the older" would be deleted.

Paragraph (9), with the first amendment proposed by the Special Rapporteur, was adopted.

Paragraph (10)

Mr. Murphy (Special Rapporteur) said that, in the last sentence, the paragraph numbers in brackets should read "(16) to (18) and (24) to (26) below".

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (25)

Paragraphs (11) to (25) were adopted.

Paragraph (26)

Mr. Park proposed the insertion of the adjectives "basic" or "fundamental human" before the word "rights" in the fourth sentence, because the unqualified reference to "rights" was rather vague.

The Chairman, speaking as a member of the Commission and supported by **Mr. Saboia**, said that qualification of the word "rights" might have the unintended effect of restricting the protection afforded to individuals facing extradition, because some of the rights affected might be procedural rather than basic, fundamental or human rights. Perhaps Mr. Park's concern could be addressed by replacing the phrase "a danger that their rights will be violated" with the phrase "a danger that rights, in particular their basic rights, will be violated".

Paragraph (26), as amended by the Chairman, was adopted.

Paragraphs (27) and (28)

Paragraphs (27) and (28) were adopted.

Paragraph (29)

Mr. Park proposed the insertion, in the last sentence, of the year of the adoption of the Model Treaty on Extradition and the inclusion of a cross-reference to footnote 90 in footnote 132.

Mr. Murphy (Special Rapporteur) said that none of the references to the Model Treaty on Extradition in the commentary mentioned the year of its adoption. Insertion of the year would create additional work for the Secretariat. Moreover, it was not customary to provide cross-references in footnotes referring to treaties. Any departure from that practice would cause the Secretariat a huge amount of additional work.

Mr. Jalloh said that some helpful material on competing requests for extradition was missing from paragraphs (29) and (30). During the debate in plenary meetings in May 2017, he had proposed the inclusion of some basic provisions setting out criteria drawn *inter alia* from article 90 of the Rome Statute of the International Criminal Court which could be used by the relevant authorities to resolve circumstances of competing requests. However, those had not been included in the draft articles on crimes against humanity, nor were they referred to in the commentary. In his view, providing States with some guidance on how to address such requests, especially given the desire of the Commission to complement the work of the International Criminal Court at the horizontal level, was a matter which should be taken up on the second reading of the draft articles and the commentary thereto. Otherwise, it might leave an avoidable gap which could cause problems in practice.

Paragraph (29) was adopted.

Paragraphs (30) to (33)

Paragraphs (30) to (33) were adopted.

The commentary to draft article 13 as a whole, as amended, was adopted.

Commentary to draft article 14 (Mutual legal assistance)

Paragraphs (1) to (21)

Paragraphs (1) to (21) were adopted.

The commentary to draft article 14 as a whole was adopted.

Commentary to draft article 15 (Settlement of disputes)

Paragraph (1)

Mr. Murphy (Special Rapporteur) proposed that, in the third sentence, the phrase "can be resolved" should be amended to read "are addressed".

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

Ms. Escobar Hernández said that, when the draft article had been adopted, she had expressed the opinion that the inclusion of a provision on the settlement of disputes was unnecessary. She would therefore appreciate the insertion of an additional paragraph in the commentary, which should read:

> "A view was expressed according to which the draft articles should not include a provision on settlement of disputes, since it constituted a final clause, a category of provisions that the Commission decided not to include in the present draft articles. In addition, the view was expressed that draft article 15 on settlement of disputes should establish the compulsory jurisdiction of the International Court of Justice as in article IX of the Genocide Convention."

> [*Se expresó la opinión de que el Proyecto de artículos no debería incluir un artículo dedicado al arreglo de controversias, ya que forma parte de la categoría disposiciones finales que la Comisión ha decidido no incluir en el proyecto. Además, se expresó la opinión de que el sistema de arreglo de controversias previsto en el artículo 15 debería establecer la jurisdicción obligatoria de la Corte Internacional de Justicia, tal como lo hace el artículo IX de la Convención sobre el Genocidio.*]

Mr. Murphy (Special Rapporteur) proposed that the wording suggested by Ms. Escobar Hernández should become paragraph (6) of the commentary.

Mr. Jalloh said that he endorsed the second sentence in the new paragraph proposed by Ms. Escobar Hernández for the sake of consistency with the Genocide Convention. That had been his own position in the Drafting Committee.

The Chairman asked Ms. Escobar Hernández to provide the Secretariat with a written version of the paragraph she was proposing, for circulation to the members of the Commission and discussion at the following meeting.

The meeting rose at 1.05 p.m.